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No. 90-1297

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. WEBSTER,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## REPLY BRIEF OF PETITIONER

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May 29, 1991

# QUESTIONS PRESENTED

WHETHER THE "CAUSE AND ACTUAL PREJUDICE" STANDARD SHOULD BE APPLIED TO ALL REQUESTS FOR RELIEF UNDER 28 U.S.C. Section 2255 ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL WHEN INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT RAISED ON APPEAL.

WHETHER A DEFENDANT'S CONVICTION UNDER 21 U.S.C. SECTION 848 SHOULD BE VACATED WHEN ONE OF THE FIVE DEFENDANTS NEEDED FOR CONVICTION UNDER 21 U.S.C. SECTION 848(c)(2)(A) HAS HIS CONVICTION REVERSED BECAUSE OF LACK OF SUFFICIENT EVIDENCE TO CONVICT HIM.

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IN THE

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
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## REPLY BRIEF OF PETITIONER

### OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals are reported at 639 F.2d 174 (4th Cir. 1981) and 669 F.2d 185 (4th Cir. 1982), the Memorandum opinion of the District Court for Maryland, and an unpublished opinion of the Fourth Circuit Court of Appeals, 90-6785 are attached as Appendix A,B,C, and D to Petitioner's Petition for Certiorari.

## JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on November 8, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

Walter Webster (Webster) was among 17 defendants charged in a 35 count indictment by a Grand Jury for the District of Maryland on February 14, 1979. Webster was tried before a jury in April and May 1979. The jury returned its verdict on May 18, 1979 convicting Webster of conducting a continuing criminal enterprise (CCE), 21 U.S.C. Section 848; conducting the affairs of an enterprise through a pattern of racketeering, 18 U.S.C. Section 1961, 1962 (c), and 1963; conspiring to distribute heroin and cocaine, 21 U.S.C. Section 846; 17 counts of illegal use of the telephone, 21 U.S.C. Section 843 (b) and (c); and 3 counts of interstate travel in aid of racketeering enterprise, 18 U.S.C. Section 1952 (a) (3).

Webster was sentenced to Fifty (50) years imprisonment on the CCE conviction, Twenty (20) years on the RICO count, Thirty (30) years on the conspiracy count, Eight (8) years on the Seventeen (17) counts of unlawful use of the telephone, and Five (5) years each for the three (3) counts of interstate travel in aid of racketeering. The sentences were ordered to run concurrent to each other.

The defendant appealed to the Fourth Circuit Court of Appeals. *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, *Webster v. United States*, 456 U.S. 935 (1982). The Court of Appeals affirmed one of the RICO convictions and directed that the defendant's con-

viction on Count II of the indictment relating to the defendant's conspiracy conviction under 21 U.S.C. Section 846 be stricken. The Court affirmed all other convictions and sentences. The Court granted the defendant's request for a hearing en banc. *United States v. Webster*, 669 F.2d 185 (4th Cir. 1982). The Court reinstated the RICO conviction that it had previously stricken. The remaining aspects of the conviction remained unchanged.

The defendant filed a motion seeking relief under 28 U.S.C. Section 2255 on April 22, 1985. The motion was denied on June 5, 1986 without a hearing. The defendant appealed the denial of that motion on August 14, 1986. The appeal was dismissed on May 21, 1987 for lack of jurisdiction because the notice of appeal was untimely filed.

On April 22, 1985 the defendant filed a motion seeking relief under 28 U.S.C. Section 2255. The motion was granted in part and denied in part on December 4, 1989. The defendant filed a Motion to Reconsider that Memorandum and Order of the United States District Court for Maryland. The motion was denied without an opinion. The defendant then filed a timely notice of appeal of the December 4, 1989 order.

## ARGUMENT

The Respondent's Brief in Opposition discusses three points, First that the Petitioner has abused the writ available under 28 U.S.C. Section 2255, Second, Petitioner has failed to met the test in *United States v. Frady*, 456 U.S. 152 (1982 and third, that Petitioner's argument that his conviction under 21 U.S.C. Section 848 (c) (2) (A) should be reversed does not warrant further review.

## ABUSE OF WRIT

The Respondent argues that the Petitioner's motion under 28 U.S.C. Section 2255 filed on April 13, 1989 constitutes an abuse of the writ under this Court's opinion in *McCleskey v. Zant* 111 S.Ct. 1454 (1991). (Resp. Brief 4-5) A petitioner who files successive motions under 28 U.S.C. Section 2255 must explain why the new claim is not an abuse only after the Government has pleaded with particularity the abuse. *Sanders v. United States* 373 U.S. 1 (1963) *Price v. Johnston*, 334 U.S. 266 (1948); *McCleskey v. Zant*, supra. This argument was not part of the Respondent's Brief to the Fourth Circuit Court of Appeals (Reply Brief App. A) and that Court did not address that issue in its decision. (Reply Brief. App. C) Any argument that the Respondent had with reference to abuse of the writ against the Petitioner was waived by their failure to assert it below. Even if this Court's mandate in *McCleskey* was applied to the facts of this case the court would entertain the motion under the ends of justice exception discussed in *McCleskey*. Under the exception this Court would consider the petition if a fundamental miscarriage of justice would result by not considering it. The exception is a safeguard against continued incarceration of a man whose convictions should be reversed. *McCleskey v. Zant*, supra, citing from *Stone v. Powell*, 428 U.S. 492-493 (1976).

The Petitioner's first motion under 28 U.S.C. Section 2255 was filed on April 22, 1985 after the decision in *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981) cert. denied, *Webster v. United States*, 456 U.S. 935 (1982) reversing the conviction of Herbert L. Johnson (Johnson) leaving only four (4) people who could qualify under 21 U.S.C. Section 848 (c) (2) (A) as being supervised by the Petitioner in order to sustain a conviction

against him. The motion was denied and Petitioner appealed. On May 21, 1987 the appeal was dismissed as being filed untimely. The Petitioner filed a second motion under 28 U.S.C. Section 2255 on December 16, 1988. The motion was supplemented on April 17, 1989. The Court granted the motion in part and denied it in part on December 9, 1989. The Petitioner appealed the denial to the Fourth Circuit Court of Appeals.

The Petitioner argued to the Fourth Circuit Court of Appeals that as a result of the reversal of Johnson's convictions under 21 U.S.C. Section Section 841 (a) (1) and 21 U.S.C. Section 843 (b) his convictions were unconstitutional and illegal. (Reply Brief App. B, pp. 36a-40a) The Court of Appeals ignored in its opinion the constitutional issue raised by the Petitioner (Reply Brief App. C) and which was opposed by the Government. (Reply Brief App. A) The failure of the Court of Appeals to address this issue is plain error that can only be remedied by granting the writ of certiorari. *Smith v. Digmon*, 434 U.S. 332 (1978).

## INEFFECTIVE ASSISTANCE OF COUNSEL

The Respondent's second argument is that the Petitioner's ineffective assistance claim was properly denied. Respondent argues that competent counsel frequently stipulate during trial and in any case Counsel could not have mounted an effective defense against the theory that the 1508 Club was engaged in interstate commerce. The Respondent misses the point. There is no need to stipulate to an essential element of the Government's case if you are mid-trial making the Government prove its burden. The stipulation was tantamount to an admission of guilt. The issue of whether the 1508 Club was involved in interstate commerce was such a nebulous issue that the

Fourth Circuit Court of Appeals initially found that the Government's evidence failed to demonstrate that the 1508 Club had its affairs advanced, or benefitted, in some fashion, direct or indirect, by the pattern of racketeering mentioned in the statute. Counsel's stipulation made it easier for the Government to convict the Petition on an essential element of the offense for which the Government's evidence was questionable.

The Petitioner maintains his position that this Court should not apply the "cause" test in *Frady* when the actions complained of are so basic to effective representation that ineffective assistance should be presumed. The complained of stipulation mid-trial is one of those instances when ineffective assistance should be presumed.

## CONVICTION UNDER 21 U.S.C. SECTION 848 (c) (2) (A)

The Respondent's third point is that the Petitioner's argument that with the reversal of Johnson's convictions there are only four (4) of the required five (5) people under the statute to sustain Petitioner's conviction does not warrant further review because the evidence is that the Petitioner supervised more than five (5) person. The Respondent misses the point of the statute. The statute requires the five (5) persons fall within the following category:

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

There is no evidence that the people that the Respondent alleges were supervised by the Petitioner met the requirements of subparagraphs (A) and (B) of the statute. On the contrary, with the reversal of Johnson's convictions the evidence is that there remains only four (4) persons of the required five (5) for a conviction under 21 U.S.C. Section 848 (c) (2) (A). (Reply Brief App. pp. 36a-40a) There being only four (4) people to supervise, Webster's conviction under 21 U.S.C. Section 848 (c) (2) (A) must be reversed. *United States v. Casamento*, 887 F.2d 1141 (2nd Cir. 1989).

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

R. KENNETH MUNDY

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above Reply Brief to the Brief in Opposition to the Petition for Writ of Certiorari were mailed to Kenneth W. Starr, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 29th day of May 1990.

R. KENNETH MUNDY

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 90-6784

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER R. WEBSTER,
Appellant.

Appeal from the United States Court for the
District of Maryland, at Baltimore
(Honorable Joseph H. Young)

## BRIEF OF APPELLEE

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*United States v. Timmreck*, 441 U.S. 780, 784 (1979) . . . . . 12a

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was the District Court's Finding, That the Condition That Would Have Triggered the Merging of Certain Sentences Did Not Obtain, Clearly Erroneous?

II. Did the District Court Commit Error By Concluding That Issues Waived on Direct Appeal Are Not Automatically Revived Through a Facile Allegation of Ineffective Assistance of Counsel?

III. Was the District Court's Finding That Counsel's Assistance Was Not Ineffective Clearly Erroneous When the Defendant Failed to Meet His Burden of Demonstrating Attorney Incompetence and a Resultant Prejudice?

## STATEMENT OF THE APPLICABLE STANDARDS OF REVIEW

The first issue raised by the defendant is whether the district court should have merged several sentences following the direct appeal. The court declined the merger because it found that an operative condition for the merger had not been met. Because this is a finding of fact, it is subject to the clearly erroneous standard. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

The district court disposed of the remaining issues raised by concluding that the issues had been waived on direct appeal and that the defendant could not construct a cognizable issue merely by asserting that failure to raise the issues on direct appeal constituted ineffective assistance of counsel. Because the conclusions regarding waiver and resuscitation are questions of law, they are subject to review for error.

The district court considered the ineffective assistance allegation as an independent claim for relief, and found that assistance was not ineffective. Because this is a finding of fact, it is subject to review for clear error.

## STATEMENT OF THE CASE

On February 14, 1979, the Grand Jury for the District of Maryland returned a 35-count Indictment charging Walter Webster, Norma Thompson, Richard Adams, Norman Henson, Boysie Ash, Victoria Wills, Herbert Johnson, John Christian, Melvin Stanford, Julius Martin, and seven others with conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846. Webster and Thompson were also charged with conducting a continuing criminal enterprise, in violation of 21 U.S.C. § 848, and with conducting the affairs of the "1508 Club," a bar they owned, through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Webster was charged, in addition, with 26 counts of using a telephone in furtherance of a narcotics enterprise, in violation of 21 U.S.C. § 843(b); with 4 counts of interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. § 1952; and with possession of heroin with the intention of distributing it, in violation of 21 U.S.C. § 841.

Trial of the 17 named defendants commenced on April 27, 1979. The jury returned its verdict on May 18, 1979, convicting Webster of conducting a continuing criminal enterprise; conducting the affairs of an enterprise, the "1508 Club," through a pattern of racketeering; conspiring to distribute heroin and cocaine; 17 counts of illegal use of the telephone; and of 3 counts of interstate travel in aid of racketeering. On July 12, 1979, the court sentenced Webster to a 50-year term of imprisonment, followed by a special parole term of 15

years, as a result of his conviction under 21 U.S.C. § 848. Webster also received a concurrent 30-year term, as a second offender, for his conviction under 21 U.S.C. § 846; a concurrent 20-year term for violating 18 U.S.C. § 1962(c); concurrent eight-year terms as to each of 17 counts of unlawful telephone use; and concurrent five-year terms as to each of three interstate travel counts. All sentences were to run concurrent with the 50-year term. Finally, the sentencing order provided that if all counts were affirmed on appeal, then the court would set aside the sentences as to the unlawful telephone use counts.

On February 28, 1979, the Grand Jury returned a second indictment of Webster and Ash, charging them with possessing, at the time of their arrest on the first indictment, heroin with the intention of distributing it, in violation of 21 U.S.C. § 841, and cocaine, in violation of 21 U.S.C. § 844. The charges against Ash were dismissed by the government prior to trial. On July 18, 1979, Webster was tried on an agreed statement of facts before District Judge Frank Kaufman. Webster was found guilty, and on August 10, 1979, was sentenced to a term of 30 years imprisonment and a special parole term of 35 years, to run concurrent with the sentence imposed upon him as a result of his convictions on the first indictment.

Appeal was taken by Webster and several other defendants. Webster's conviction as to all but two counts was affirmed. The panel reversed the conviction of the RICO offense, finding that the government failed to prove that the specified enterprise had "had its affairs advanced or benefitted in some fashion, direct or indirect, by the pattern of racketeering activity." *United States v. Webster*, 639 F.2d 174, 185-86 (4th Cir.), *cert. denied sub nom Christian v. United States*, 454 U.S. 857 (1981). This

interpretation of 18 U.S.C. § 1962(c) was later corrected on rehearing by the same panel, and the RICO conviction was affirmed. *United States v. Webster,* 669 F.2d 185, 187 (4th Cir. 1982). The panel on rehearing left undisturbed its earlier opinion in all other aspects, including the vacation of Webster's conviction under 21 U.S.C. § 846.

On April 22, 1985, Webster filed a motion pursuant to 28 U.S.C. § 2255. On June 5, 1986, the motion was denied without an evidentiary hearing, and by marginal order dated July 18, 1986, the district court denied a letter request from Webster's counsel asking that the June 5 order be stricken. On August 14, 1986, Webster appealed the denial of his 2255 motion. On May 21, 1987, this Court dismissed the appeal for lack of jurisdiction due to the untimely notice of appeal.

On December 16, 1988, this second motion, pursuant to Section 2255 was filed. It was supplemented by the defendant on April 17, 1989, and was granted in part and denied in part on December 4, 1989.[1] A subsequent motion to reconsider was denied, and defendant filed a timely notice of appeal.

## STATEMENT OF FACTS

As part of the defendant's sentence, the court ordered as follows:

> It is further provided that if there is an appeal and the convictions on all counts are affirmed on appeal, this Court will set aside the sentences imposed as to

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[1] Defendant's first request below was that this Court's mandate on direct appeal, that the conviction under 21 U.S.C. § 846 be vacated, be given effect. Because such a result was appropriate, this part of the motion was granted.

each of Counts Nos. 4, 5, 6, . . . and 27 as merging into the greater sentence imposed under Count No. 2.

(A.1). The defendant appealed his conviction and raised many issues concerning various aspects of the investigation, indictment, and trial. *Webster*, 639 F.2d at 177. Convictions on all but one count were affirmed on appeal. *Webster*, 669 F.2d at 187.

## ARGUMENT

The defendant has specified five issues in his brief, but several of these concern the merits of issues not decided below. The defendant's amended petition raised a total of seven issues; most of these concerned sufficiency of the evidence and instructions given at trial. The court did not reach the merits of the trial issues, concluding instead that the issues had been waived by a failure to raise them on direct appeal. The court grounded this conclusion on the defendant's correct concession that the issues were indeed waived. (A. 22).

Despite the concession, the defendant argued that he should be exempted because the waiver resulted from ineffective assistance of counsel. The court concluded that the waived issues could not be revived merely by asserting them as grounds in support of an allegation of ineffective assistance. Instead and correctly, the court considered the Sixth Amendment issue as an independent claim for relief, and found it lacking in merit.

The only issue raised below that was not available at the time of the direct appeal is whether the sentence provision for a contingent merging of the sentences imposed for the telephone use convictions should be given effect. The district court properly treated this as a factual in-

quiry into whether the triggering event had occurred, easily determined that the event had not occurred, and correctly denied relief.

On this appeal, the defendant seems to suggest that there is some legal basis requiring that the *convictions* on the telephone use counts merge as lesser included offenses into the vacated conspiracy count. Appellant's Brief at 6-7. This, however, is an issue that would operate independently, having nothing to do with the contingency created in the sentencing order. Consequently, like the other issues raised below, this issue was waived when it was not raised on direct appeal.

At bottom, there are only three issues cognizable on this appeal. First is whether the district court correctly found that the necessary event did not obtain that would have triggered the conditional merging of sentences. The second issue is whether waived issues can be revived simply by alleging that the waiver constitutes ineffective assistance of counsel. Finally, the district court's finding that ineffective assistance had not been demonstrated is reviewable for clear error.

Because the record supports the court's conclusion that the merger-triggering event did not obtain, the finding is not clearly erroneous. Because waived issues cannot be bootstrapped into an ineffective assistance of counsel claim, the district court's conclusion to this effect was not erroneous. Finally, because the defendant failed to meet his burden of demonstrating attorney incompetence and a resultant prejudice, it was not clear error for the court to find that counsel's assistance was not ineffective.

I. The District Court's Finding, That The Condition Did Not Obtain That Would Have Triggered A Merging Of Certain Sentences, Was Not Erroneous

The defendant contends that the district court committed error by refusing to set aside several eight-year sentences. The Judgment and Commitment Order, however, clearly provides that the relevant sentences were only to be set aside if "the convictions on all other counts are affirmed on appeal . . ." (A.1) The defendant acknowledges in his brief that "this Court set aside the conspiracy conviction under Count 2." Appellant's Brief at 6. Thus, the defendant, in effect, acknowledges that not all convictions were affirmed on direct appeal.

A finding of fact is not clearly erroneous if there is support for it in the record. *See Davis v. United States*, 328 U.S. 582, 593-94 (1946). This Court's mandate vacating the Count 2 conviction is part of the record and stands as obvious support for the district court's conclusion that this condition to the merging did not obtain. Consequently, the finding is not clearly erroneous.

The defendant argues that it is reasonable to merge the telephone use counts into the CCE count because the conspiracy count so merged. This argument, however, misses the point that he seeks merger through an application of the language of the Judgment and Commitment Order, not as a result of an independent legal theory. As is discussed above, an argument seeking merger as a matter of law has nothing to do with the sentencing order, and, moreover, was waived by a failure to raise it on direct appeal.

In sum, the record supports the district court's conclusion that not all convictions were affirmed on appeal;

therefore, the conclusion is not clearly erroneous. Because this condition did not obtain, the court correctly concluded that its sentencing order did not provide for a merging of the telephone use counts. Consequently, defendant's allegation of error lacks merit.

II. It Was Not Error For The District Court To Conclude That An Allegation Of Ineffective Assistance Of Counsel May Not Be Used to Establish Cause Under the "Frady" Standard

The defendant raised four challenges below to the sufficiency of the evidence and to the propriety of certain instructions to the jury.[2] He also conceded that "these four claims in question should have been raised on direct appeal . . ." (A.22). Defendant argued, however, as follows:

> It is precisely *that failure of counsel to raise the issues on direct* appeal, in addition to the plain error standard, that allows the defendant to raise these issues on collateral attack pursuant to 28 U.S.C. § 2255.

(A.22) (defendant's emphasis). Thus, the defendant asserted that an issue otherwise waived on direct appeal could somehow be revived merely by tacking on a claim of ineffective assistance of counsel. The district court rejected such a talismanic invocation of the Sixth Amendment and properly concluded that an allegation of ineffective assistance of counsel must be considered as a distinct

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[2] The four allegations were: (1) whether the evidence was sufficient to sustain the CCE conviction; (2) whether an instruction identifying an accomplice as an accomplice was proper; (3) whether the defendant was entitled to a unanimity instruction regarding the identities of the persons organized, supervised, or managed by the defendant; and (4) whether defense counsel may stipulate to certain facts.

claim. Applying this approach, the court concluded at bottom that, based on the entire record, the defense counsel's performance "met the recognized standards of quality and effectiveness." (A.24)

The defendant now argues that the court erroneously separated the previously waived issues from his Sixth Amendment claim, and that an assertion of "ineffective assistance of counsel is sufficient here to allow review of the [waived issues] . . . ." Appellant's Brief at 15. The defendant, however, misapprehends the applicable law.

It is well settled that collateral attack will not be allowed "to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). *See United States v. Timmreck*, 441 U.S. 780, 784 (1979). This logic is carried forward in *United States v. Frady*, 456 U.S. 152 (1982), where the Supreme Court established the standard for relief on collateral review of alleged trial errors. Under this standard "the defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168. Defendant Webster attempted below to establish cause under this standard by alleging that his counsel was ineffective, but this is not the nature of 'cause' to which the Court was referring.

In *Frady*, the defendant claimed that he had failed to challenge an improper jury instruction on direct appeal because the court of appeals first rejected a similar instruction two years *after* his appeal was decided. *Id.* at 168 n.16. Along these lines, in *Sunal* the Supreme Court elaborated on the "exceptional circumstances" which would qualify as cause for defaulting an issue on direct appeal:

> It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in

> the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal . . . . Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications.

332 U.S. at 182. The defendant did not point to such a statutory or interpretative shift to justify the failure to seek a direct appeal as to the alleged trial errors. Instead, he simply alleged that the "cause" for the default was ineffective counsel, and that ineffectiveness is demonstrated by the default.

A similar argument was addressed by the Supreme Court in *Murray v. Carrier*, 477 U.S. 428 (1986). There, the defense counsel failed to conduct obvious discovery and as a result failed to file a timely motion to suppress certain evidence. *Id.* at 482. The evidence was admitted; the defendant was convicted; and on appeal, counsel failed to raise the issue. *Id.* A federal district court denied the subsequent habeas petition, finding that the suppression issues had been effectively waived by default. *Id.* at 483.

Like Webster, the defendant argued that the issues had been waived as a result of attorney error and that such an error was proper "cause" for habeas review under *Frady*. *Id.* The Supreme Court clearly rejected this proposition:

> the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.

*Id.* at 486-87. Thus, the simple allegation that an issue was not raised by defense counsel does not meet the first prong of the *Frady* "cause and prejudice" test.

The Court went on to establish that a showing of something more could meet the level of cause required:

> So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984),] we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

*Id.* at 488. Thus, the allegation of attorney error must either implicate the Sixth Amendment or be enhanced by a showing of some external force that led to the default. Webster has not even alleged an external factor, let alone met the burden of demonstrating the existence of one. Therefore, under *Murray v. Carrier*, the defendant has failed to demonstrate " 'cause' excusing his double procedural default," as is required under *Frady*, 456 U.S. at 168.

The defendant attempts to enhance the alleged attorney error by labeling it "ineffective assistance of counsel." Indeed, in *Murray v. Carrier*, the Supreme Court did recognize that "[i]neffective assistance of counsel, then, is cause for a procedural default." 477 U.S. at 488. The Court went on to state, however, that ineffective assistance must be considered "as an independent claim *before* it may be used to establish cause for a procedural default." *Id.* at 489. The record clearly shows that the district court did exactly that. The court considered the allegation of ineffective assistance as a separate issue and stated as follows:

> A review of the entire record in this case reaffirms this Court's impression that defendant Webster received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness. Webster's motion to vacate based on ineffective assistance of counsel will, accordingly, be denied.

(A. 24). Thus, because counsel's assistance was not ineffective, Webster failed to establish "cause" under *Frady* and *Carrier.*

Webster relies heavily on *Kimmelman v. Morrison*, 477 U.S. 365 (1986), where the Supreme Court held that claims of ineffective assistance of counsel are cognizable on collateral attack. *Kimmelman,* however, does not require that the habeas court consider the merits of defaulted issues. To the contrary, and entirely consistent with its opinion in *Carrier,* the Supreme Court requires that the assistance of counsel be considered as an independent issue.

> We do not share petitioner's perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, *the two claims are nonetheless distinct, both in nature and in the requisite elements of proof.*

477 U.S. at 374 (emphasis supplied). Thus, the district court was not in error when it considered the allegation of ineffective assistance as a distinct claim.

Because the elements of proof necessary to a demonstration of ineffective assistance are distinct from those necessary to a demonstration of the alleged trial errors,

the defendant's argument that a decision on the merits is required in any case is incorrect. The Sixth Amendment claim must be evaluated under the rigorous standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Carrier*, 477 U.S. at 488; *Kimmelman*, 477 U.S. at 381-82. Only after ineffective assistance is found by the district court, has the cause for the waiver of the trial issues been demonstrated. And only then should the court consider the merits of waived issues.

Because the district court did not find that counsel's assistance was ineffective, cause under *Frady* was not established. Consequently, it was not error to refuse to consider the merits of the alleged trial errors.

III. The District Court's Finding That Counsel's Assistance Was Not Ineffective Was Not Clearly Erroneous When The Defendant Failed To Meet His Burden Of Demonstrating Attorney Incompetence And A Resultant Prejudice

Once the Sixth Amendment claim was severed from the other issues, the court found that counsel's assistance was not ineffective, and the court properly employed the *Strickland* standard in reaching this conclusion. *Strickland* places the burden on the defendant to prove both incompetence and prejudice as a result. 466 U.S. at 687. Webster failed as to both elements below.

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Because the defendant did not even attempt to meet either burden below, the Sixth Amendment claim was properly rejected.

As to the first element, the defendant asserts that his allegations of trial error demonstrate deficient perform-

ance. As the government demonstrated at length in its Answer below, the allegations of error are without merit. At the very best, the defendant has established that his fine-toothed rake has unearthed arguable propositions, but this is nowhere near a sufficient showing. He did not demonstrate that it would have been incompetent for trial counsel to have decided not to raise the issues. He merely assumes that it would be incompetence to fail to raise the issues that he has specified.

Even assuming *arguendo*, that defendant's tissue issues have merit, the trial counsel's choice not to raise them is due a high degree of deference. *Strickland*, 466 U.S. at 689. The decision not to object at trial is accorded a heavy presumption that it was within "the wide latitude counsel must have in making tactical decisions." *Id.* Consequently, the defendant has a heavy burden in order to overcome this presumption. A review of defendant's motion reveals that he made no attempt to even address this presumption or to show how the alleged errors could not have been tactical decisions.[3] Therefore, the presumption prevails even if the allegations had merit, and the challenge to counsel's effectiveness was properly rejected.

On appeal, defendant's argument is even weaker. He argues simply that "Appellant *had a right* to have his trial counsel object to the use of the court's erroneous instruction . . ." and that "Appellant *was entitled, as a matter of law,* to have the judge at trial to charge the jury with a specific unanimity instruction. . . ." Appellant's Brief

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[3] Along these lines, it should not escape notice that at least seventeen issues pertaining to Webster were argued on direct appeal. Webster, 639 F.2d 174. It would not be unusual in such circumstances to decline to raise less meritorious issues in order to focus the appeal.

at 24 (emphasis supplied). Once again the government submits that both propositions are wrong as a matter of law; but assuming, *arguendo*, that the propositions are correct, the demonstration of error is insufficient under *Strickland*. The defendant must, as his burden, show that the errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Vague references to due process and fairness are nothing but half-hearted attempts at sensationalizing the allegations.

There is absolutely no point in considering the merits of the allegations of error if the defendant fails to describe a *specific theory* whereby the error can be seen as a factor yielding a total miscarriage of justice. A defendant is entitled to a fair trial, not an error-free one. Under *Strickland*, Webster is not permitted to simply allege error and then wait for the government to show that, in context, the defense was competent notwithstanding the error. It is expressly the defendant's burden to place the error in context and then show that the context depicts a lack of counsel. 466 U.S. at 688 ("the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). In short, the defendant did not fill in the entire picture; instead, he hangs his weak allegations of error in mid-air like the grin of the Cheshire Cat.

As to the second element of the *Strickland* test, the defendant makes only conclusory allegations of prejudice. For example, he stated below that, had his counsel not stipulated that the 1508 Club was an enterprise engaged in or affecting interstate commerce, the jury would have acquitted on the RICO count. He ignores the certainty that without the stipulation the government would have supplied proof of this fact. Similarly, on appeal he posits that, had the trial court given a unanimity instruction concerning the identities of the persons organized

for CCE purposes, he would have been acquitted. Appellant's Brief at 24. He ignores the possibility that the jury could have easily agreed on more than five specific persons. *Strickland* requires a great deal more.

As above, the government maintains that defendant's allegations of error are totally lacking in merit. Notwithstanding this crucial deficit in defendant's argument, and assuming, *arguendo*, that error could be shown, and assuming, *arguendo*, that the errors in context demonstrated attorney incompetence, the defendant would still have to demonstrate actual prejudice. In order to demonstrate actual prejudice,

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Strickland*, 466 U.S. at 694. The defendant totally fails in this regard.

Webster claimed below that counsel failed to object to insufficient evidence that he organized five or more persons. Because the record reflects that he organized dozens, such an objection would have been rejected as frivolous. He claimed below that counsel failed to object to an instruction identifying an accomplice as such. Because the record reflects that the accomplice admitted participating as an accomplice, an objection would have been rejected as frivolous. He claimed below that counsel failed to request a unanimity instruction concerning the identities of the persons organized for CCE purposes. Because courts have consistently rejected such an instruction, both before Webster's trial and since, the request most certainly would have been denied. He claimed below that counsel improperly stipulated that interstate commerce was implicated. Because the government would have

offered proof of this fact, an absence of a stipulation does not necessarily imply an absence of proof. In short, if defense counsel had made the additional objections, requested the instruction, and declined the stipulation, the trial result would have been identical.

More to the point, however, is the fact that even at this stage of the inquiry the merits of these issues need not be examined. Before the merits become material, the defendant must demonstrate that there is a "reasonable probability" that he would have been acquitted. In this regard, he has made no attempt to explain away the overwhelming trial evidence of his guilt.

The defendant has not shown that his allegations of error had any conceivable effect on the outcome of the proceeding, much less has he shown a reasonable probability that he would have been acquitted. Consequently, he has failed to demonstrate even a shadow of prejudice, under *Strickland*, he has demonstrated exactly nothing.

## CONCLUSION

For the foregoing reasons, the district court's denial of the Motion Pursuant to Section 2255 should be affirmed.

Respectfully submitted,

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## APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

Appeal No. 90-6784

WALTER R. WEBSTER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States District Court
For The District of Maryland
The Honorable Joseph H. Young

APPELLANT'S BRIEF

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## ISSUES PRESENTED

A. Whether the District Court should comply with its initial ruling and set aside seventeen counts of illegal use of the telephone if all other counts were affirmed on direct appeal.

B. Whether the District Court erred in holding that ineffective assistance of counsel may not properly be used for of collateral review under 28 U.S.C. Section 2255 issues that could have been raised on direct appeal.

C. Whether this Court should review Appellant's claim that the evidence is legally insufficient to sustain the conviction of a continuing criminal enterprise.

D. Whether Appellant's challenge to the RICO Conviction (18 U.S.C. Section 1962(c)) constitutes a question of jurisdiction raisable at any time to permit review under 28 U.S.C. Section 2255.

E. Whether the District Court erred in holding that appellant was not denied the effective assistance of counsel at trial and on direct appeal.

## STATEMENT OF THE CASE

In 1979 a 34 Count criminal indictment in the United States District Court for the District of Maryland charged Appellant and others, with violation (narcotics) of 21 U.S.C. Section 846, 841, and 843. Appellant, alone, with a continuing criminal enterprise (CCE) in violation of 21 U.S.C. Section 848. See *United States v. Walter R. Webster, et al.*, Criminal No. Y-79-060.

After disposition of pre-trial motions and disposition certain indicted co-defendants, Appellant and remaining co-defendants (Richard Adams, Norma Thompson, Boy-

sie Ash, Victoria Wills, John V. Christian, Herbert Leon Johnson, and Julius Odell Martin) proceeded to trial. The jury convicted Appellant on all counts (including CCE; conducting the affairs of the enterprise through a pattern of racketeering, 18 U.S.C. Section 1961, 1962(a) and 1963; conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. Section 846; 17 counts of illegal use of the telephone, in violation of 21 U.S.C. Section 843; and 3 counts of interstate travel in aid of racketeering in violation of 18 U.S.C. Section 1952). The jury returned verdicts of not guilty as charged on all counts of the indictment as to co-defendants Standford and Martin. Co-defendants Thompson, Ash, Wills, Christian, and Herbert Leon Johnson were found guilty of a conspiracy (21 U.S.C. Section 846) to violate the federal narcotics laws.

On July 9, 1979, the Court sentenced Appellant to fifty (50) years imprisonment on the CCE, (Count 34); twenty (20) years on RICO (Count 1); thirty (30) years on the 21 U.S.C. 846 conspiracy conviction; eight (8) years each on 17 counts of unlawful use of the telephone (Counts 4, 5, 6, 8, 22, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 27); and five (5) years on each of the three counts of interstate travel in aid of racketeering (Counts 30, 31, and 32). The sentence were fashioned to run concurrently (total term of imprisonment fifty (50) years).

The sentencing order further provided that if there is an appeal and if convictions on all counts are affirmed on appeal, the sentencing court would set aside the sentences imposed as to Counts 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25 and 27; they would merge into the greater sentence imposed on Count 2.

On direct appeal from the convictions and sentences by Appellant and his convicted co-defendants, the Appeals Court for the Fourth Circuit 1) ordered Appellant's conviction stricken as to Count 2 of the Indictment; 2) affirmed Appellant's convictions and sentences on all other counts. The Court reversed the 21 U.S.C. 846 conspiracy convictions against Appellant's co-defendant, Herbert Leon Johnson, on insufficiency of evidence. The Court affirmed the convictions and sentences as to all other co-defendants. (*United States v. Webster*, 639 F.2d 174 (4th Cir. 1981)).

After consideration of a petition for rehearing, the Court of Appeals, *en banc*, reversed the original the panel and reinstated the RICO conviction and sentence on Appellant. The original panel decision was undisturbed in all other respects. A petition for a writ of certiorari was denied by the Supreme Court. During the latter part of 1988, Appellant filed with the Court below a Motion to Set Aside Sentence pursuant to 28 U.S.C. Section 1651(a) and 2202. In April 1989, Appellant submitted a motion to vacate and set aside sentence and accompanying supplement thereto pursuant to 28 U.S.C. Section 2255.

At sentencing in July 1979, the court had specified that if all counts were affirmed on direct appeal, the sentencing court would set aside the sentences as to the 17 counts of illegal use of the telephone against Appellant. The convictions on all counts were affirmed with the exception of the conviction as to Count 2 (conspiracy in violation of 21 U.S.C. Section 846) which was ordered stricken as merging into the greater offense at Count 34 (CCE 21 U.S.C. Section 848). Appellant moved the sentencing court to comply with the mandate of the Court of Appeals, by striking the conspiracy conviction and asked the sentencing court to comply with its initial proviso by vacating and setting aside the sentences on the 17 Counts of illegal use of the telephone.

After the government's response to said motions and without hearing, the District Court entered a Memorandum and Order December 4, 1989 granting in part and denying in part the motion to set aside sentence pursuant to 28 U.S.C. Section 1651(a) and 2202[1] and further denying Appellant's motion to vacate and set aside sentence under 28 U.S.C. Section 2255. A subsequent motion to reconsider the Memorandum and Order pursuant to Rule 59, Federal Rules of Civil Procedure was denied without opinion. Appellant then filed a timely notice of Appeal from the December 4, 1989 Memorandum and Order.

Appellant's Motion to Vacate and Set Aside Sentence pursuant to 28 U.S.C. Section 2255 presented several distinct constitutional claims challenging the validity of the convictions against him on grounds that (a) the evidence was insufficient to sustain a conviction under 21 U.S.C. section 848 (CCE); (b) the trial Court's instructions were insufficient to sustain a conviction under 21 U.S.C. Section 848 (CCE) and were erroneous and caused Appellant to be denied a fair trial; (c) the jury was denied the opportunity to consider a factual element of the RICO offense due to an unauthorized stipulation by defense counsel, and (d) ineffective assistance of counsel at trial and on direct appeal. Finding that there was an absence of good cause supporting a collateral attack of the CCE and RICO convictions and sentences under 28 U.S.C. Section 2255, the District Court denied relief without reaching the merits of the claims. The District Court ruled that these should have been raised in the direct appeal.

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[1] The Court granted the motion in part by striking the conviction and sentence under Count 2 of the Indictment and denied the motion in part by refusing to vacate and set aside the sentences as to the 17 Counts of illegal use of the telephone.

The memorandum and order of the District Court below is erroneous as a matter of law.

## ARGUMENT

### I. THE APPELLANT IS ENTITLED TO HAVE THE DISTRICT COURT COMPLY WITH ITS INITIAL SENTENCING COMMITMENT AND SET ASIDE SEVENTEEN COUNTS OF ILLEGAL USE OF THE TELEPHONE SINCE ALL OTHER CONVICTIONS WERE AFFIRMED ON DIRECT APPEAL.

The Court's precise language was:

> "It is further provided that if there is an appeal and the convictions on all counts are affirmed on appeal, this court will set aside the sentencing imposed as to each of Counts Nos. 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 23, 24, 25, and 27 as merging into the greater sentence imposed under count No. 2" *Judgment and Commitment Order dated July 9, 1979.*

The Court below, on Motion to Vacate and set aside the 17 convictions of illegal use of the telephone, took the position that since the Court of Appeals appeal had struck Appellant's conviction under 21 U.S.C. Section 848 (CCE). All convictions of appellant were not affirmed on appeal. This rationale of the Court is contrary precedents defining the relationship between conspiracy in violation of the 21 U.S.C. Section 846 and conducting a continuing criminal enterprise (CCE) in violation of the 21 U.S.C. Section 848. As this Court noted in deciding Appellant's direct appeal:

> "Although at least two Circuit Court of Appeals have stated Section 846 is a lesser included offense of Section 848, see *United States v. Strickland*, 591

F.2d 1112, 1123 (5th Cir. 1979), cert. denied, 449 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); *United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir 1977), it is unnecessary that we decide the issue. At oral argument, counsel for the United States admitted that Section 846 is a lesser included offense of Section 848 and thus that the offenses merged. Accordingly, we hold that Appellant's sentence under Section 846 must be stricken." *United States v. Webster*, 639 F.2d 174, 182 (4th Cir. 1981)

For obvious reasons sounding in the Fifth Amendment's prohibition against double jeopardy, this Court set aside the conspiracy conviction under Count 2, as duplicative of the conviction on the greater offense. It would otherwise be constitutionally impermissible. See *United States v. Butler*, 885 F.2d 195, 202 (4th Cir. 1989). See also, *United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *United States v. Aguilar*, 849 F.92, 97-99 (3rd Cir. 1988) (holding conspiracy to be a lesser included offense of CCE). Thus the Count 2 conspiracy conviction "merged" into the Count 34 CCE conviction for constitutional reasons. The plain language of the judgment and commitment Order contemplated that the sentences on the telephone counts would merge into the sentence imposed for the conspiracy. We submit it would be irrational to hold that the initial intent of the sentencing court is now defeated because the Fifth Amendment of the Constitution of the United States caused the lesser Count 2 offense to merge into the greater CCE offense. Reason and due process dictates that the justification for "merging" sentences for the telephone counts is still applicable.

Accordingly, the court below should be reversed and this matter remanded with instructions to vacate and set aside the sentences imposed as to each of the Counts Nos. 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 27 and for compliance with original judgment and commitment order of the sentencing court.

II. THE DISTRICT COURT ERRED IN HOLDING THAT INEFFECTIVE ASSISTANCE OF COUNSEL MAY NOT PROPERLY BE THE BASIS FOR COLLATERAL REVIEW UNDER 28 U.S.C. SECTION 2255 OF ISSUES THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL.

Appellant presented to the trial court claims that (a) the evidence was insufficient to sustain a conviction under 21 U.S.C. Section 848 (CCE), (b) the trial judge's instructions to the jury were erroneous and caused Appellant to be denied a fair trial, (c) the jury was denied opportunity to consider a factual element of the RICO offense due to an unauthorized stipulation by defense counsel, and (d) ineffective assistance of counsel at trial and on direct appeal. The Court parried the claims and applied the "cause and actual prejudice standard enunciated in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed 2d 816 (1982), holding finally that:

> ". . . allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing "cause" so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal . . . [it] would clearly violate society's legitimate interest n the finality of the judgment of conviction".

The District Court's application of *Frady* is misplaced under the circumstances of the instant case, as the Supreme Court of the United States, recognizing the constitutional right of defendants to the effective assistance of counsel, unequivocally established "ineffective assistance of counsel" as sufficient "cause" under the "cause and actual prejudice" standard to permit review of procedurally defaulted claims on collateral attack. *See Kimmelman v. Morrison*, 447 U.S. 365, 91 L.ed.2d 305, 106 S.Ct. 2574 (1986). The Supreme Court in *Kimmelman* reasoned that:

> "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the lititgation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell v. Alabama, Supra*, at 69, 77 L.Ed. 158, 53 S.Ct. 84 ALR 527; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial coun-

> sel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. See *Evitts, Supra.* Thus, we cannot say as the Court was able to say in *Stone,* that restriction of federal habeas review would not severely interfere with the . . . constitutional right asserted by the habeas petitioner. *Kimmelman,* 91 L.Ed 2d at 321.

In a compelling footnote, Kimmelman further states:

> Moreover, the restriction of federal habeas relief established by *Stone v Powell* was predicated on the existence at trial and on direct review of "an opportunity for full and fair litigation" of the constitutional claim advanced by the habeas petitioner. 428 U.S. 465, 49 L.Ed .2d 1067, 96 S.Ct. 3037 (1976). In general, comparable, meaningful opportunity exists for the full an fair litigation of habeas petitioner's ineffective assistance claim at trial and on direct review." *Kimmelman* 91 L.Ed.2d at 321 n.3

Not only is the District Court's reasoning in the instant case founded on rationale which precedes *Kimmelman v. Morrison, supra, Strickland v. Washington,* 466 U.S. 668 (1984), and *Evitts v. Lucey,* 469 U.S. 387 (1985), the District Court's reasoning lends no support to the public's interest in ensuring that every defendant charged with a criminal offense receives fair proceedings, trial and appellate, under the fundamental protection of the Constitution of the United States. The Sixth Amendment right to effective assistance of counsel, as the Supreme Court pointed out, is "beyond question a fundamental right".

As to the District Court,s conclusion that the claims raised by Appellant on collateral attack pursuant to 28 U.S.C. Section 2255 should have been raised on direct

appeal, surely judicial fairness would not excuse the failures of counsel to timely and appropriately present these claims nor should counsel be placed upon Appellant's shoulders. Such penalization of a defendant who brings a collateral attack against conviction, would flutter in the face of a constitutional right to a fair trial under Sixth Amendment Standards. It is through counsel that an accused's rights are indicated. (*Kimmelman*, 91 L.Ed.2d at 320). Thus, the facts of the instant case require judicial evaluation of the legal representation in Appellant's case both at trial and on direct appeal.

The District Court below have not considered Appellant's "right" to have trial counsel make necessary objections and have appellate counsel raise necessary issues on direct appeal.

The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. In *Strickland v Washington, supra*, the Supreme Court counsel's tactical strategies, reviewed "from counsel's perspective at the time," *Id at 466 United States at 690.* Therefore, collateral attack to address issues which should have initially been raised at trial and on direct appeal must be an avenue open to a defendant in a criminal case who has been, *per se*, deprived of his right to fully litigate constitutional claims and challenges or convictions unfairly procured. The Supreme Court has recognized that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Kimmelman v. Morrison, supra*, citing *Murray v. Carrier*, 106 S,Ct, 2639 (1986). Concerning counsel's failure to object to or request a limiting instruction on the prosecution's use of details of a defendant's robbery conviction, the United States Court of Appeals for the Fifth Circuit reasoned that "[t]o pass over the admission of prejudicial

and arguably inadmissable evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissable evidence, as here, has no strategic value." *Lyons v. McCotter,* 770 F.2d 529, 534 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 833 (1986). In another case, the Fifth Circuit found failure to raise two non-frivolous issues on appeal unreasonable. *Lockhart v. McCotter,* 782 F.2d 1275, 1283 (5th Cir. 1986).

In the instant case, the Court below stated that the issues raised by Appellant's 2255 motion should have been raised on direct appeal. The court did not find the issues frivolous nor meritless. It simply diverted and deflected them for tardiness. This we respectfully submit was error because due process guarantees the right to effective assistance of counsel on first appeal as a matter of right. See, *Evitts v. Lucey,* 469 U.S. at 390.

Appellant's effort to establish requisite with a 2255 Motion by averring ineffective assistance of counsel is not without merit. The trial court's contrary finding is erroneous as a matter of law, should be reversed, and the matter remanded to meet *Kimmelman v. Morrison, supra.*

The District Court's finding that "allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing "cause" so as to afford [Appellant] a second chance at appellate review of any and all issues that could have been raised during the direct appeal," (*Memorandum and Order, pp. 5-6.*) must also be reversed to satisfy *Evitts v. Lucey, supra.*

In declining to entertain Appellant's claim challenging the constitutionality of the RICO conviction where said RICO conviction is obtained by the use of an unauthorized stipulation which relieved the jury of making a finding on an essential element (that the 1508 Club's business operated in a manner effecting interstate commerce), the

Court stated that "the issue of whether or not Appellant's counsel was ineffective at trial is one which was available to the defendant at the time of the direct appeal and may not properly be raised on collateral attack." *Memorandum and Order, p. 7.* As a matter of law, this ruling too is erroneous and must be reversed under *Kimmelman v Morrison, supra.* Moreover, the lower court's findings on this issue are, unsupportable. The record establishes that trial counsel was the *same* counsel who handled the direct appeal. Under such circumstances, it would be unexpected that appellate counsel would mark his own failure to make objections at trial. He would be in the awkward position of alleging his own incompetency; or a more charitable reason may be that the omission would not appear to him as incompetence since the eyes and ideas of the appellate advocate are the same as those of the trial advocate.

In determining that attorney oversight appear to be only plausible explanation for [the attorney's] failure to timely file an asylum application on behalf of a detained immigrant, this Court decided that:

> "In view of these facts, we must vacate the FBI's findings that Figeroa did not suffer ineffective assistance of counsel. The evidence is clear that Tellez's conduct failed to meet even the minimum level of competence expected of an attorney under these circumstances. At the very least, an attorney is ethically bound to act in the best of his client's interests. See e.g. ABA Code of Professional responsibility, Canons 6, 7 and EC7-1. There seems little doubt that Tellez's conduct failed to meet this standard." See *Figeroa v. United States I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989).

This Court should therefore find that for the purpose of establishing "Cause", under *Frady*, ineffective assis-

tance of counsel is sufficient here to allow review of the claims presented by Appellant's 2255 motion, in light of *Kimmelman v. Morrison, supra,* and *Figeroa v. United States I.N.S., supra.*

Accordingly this Court should find that the District Court below has ruled in error and remand this case to the for an evidentiary hearing on the merits of Appellant's claims to determine whether the racketeering conviction and the CCE conviction should be vacated and set aside under 28 U.S.C. Section 2255.

In the alternative, the Court of Appeals could afford Appellant's Motion to Vacate and Set Aside Sentence under 28 U.S.C. Section 2255 *de novo* review because of the District Court's refusal and failure to consider Appellant's 2255 claims on the merits.

## III. THE COURT SHOULD REVIEW APPELLANT'S CLAIM THAT THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE CONVICTION FOR A CONTINUING CRIMINAL ENTERPRISE.

At the beginning of trial on the court instructed the Jury that it was not to be concerned with any of the other persons listed on the initial page of the indictment as defendants in Appellant's trial. The court further instructed the jury that the others had already been dealt with. The remaining defendants were Adams, Thompson, Ash, Wills, Christian, Herbert Leon Johnson, Stanford, and Martin.

Stanford and Martin were acquitted on all counts. Thompson, Ash, Wills, Christian and Johnson were convicted of the 846 Count, Thompson, Ash, Wills, Christian, and Johnson were convicted as co-conspirators in the entity orchestrated by Appellant. Adams was found guilty of Count 2 of the indictment (846), unlawful use

of the telephone, and aiding and abetting. It was proven at trial as alleged in the indictment that Adams was merely the supplier of narcotics was not under Appellant's management or supervision.

On appeal this court found the evidence was insufficient to support a conviction for conspiracy to distribute narcotics against co-defendant Herbert Leon Johnson as follows:

> "The question demanding our resolution is whether the evidence summarized above, viewed in light most favorable to the government, is sufficient to convict Johnson of conspiracy to distribute, or possession with intent to distribute narcotics. We conclude the evidence is not sufficient and therefore reverse Johnson's conviction under the conspiracy count. . . while the government may have proved that Johnson used drugs, it did not prove he was a "heroin distributor" as the indictment charged. . again, there is no proof Johnson telephoned for any other purpose than to at most supply his own habit. We decline to find guilt of distribution simply on the basis of association. *United Sates v. Webster*, 639 F.2d 174, 188 (4th Cir. 1981).

Since Johnson was not a part of the narcotics conspiracy it can only be assumed that the jury improperly inferred that Johnson was *one* of the "five or more persons" for whom Appellant was charged with a supervisory and managerial role. The jury's erroneous reliance on Johnson's new presence in the indictment makes the conviction of appellant reversible. Where the evidence was insufficient to establish Johnson as a distributor for Appellant, the evidence is equally insufficient to establish that Appellant occupied a position as manager or supervisor over Johnson and thus there are not the five required underlings. As a corollary we note that the

Supreme Court has held that: Where two are charged with criminal conspiracy and the conviction of one is reversed because of insufficiency of evidence, the conviction of the other must likewise be reversed. *Ferbardi v. United States*, 287 U.S. 112, 53 S.Ct. 35, 77 L.Ed. 206.

The Supreme Court also held that:

> "A federal appellate court, under the harmless error statute, should permit a judgment to stand not withstanding error, where the court is sure that the error did not influence the jury or had but very slight effect on it, except perhaps where the departure is from a constitutional norm of a specific command of congress; but if the court, after pondering all that happened without stripping the erroneous action from the whole, cannot say with fair assurance that the judgment was not substantially swayed by the error, the judgment must be reversed, even though there may have been enough to support the result apart from the phase affected by the error. *Kotteakos v. United States*, 328 U.S. 7550, 66 S.Ct. 1239, 90 L.Ed. 1557.

In order to establish violation of 21 U.S.C. 848, it is incumbent upon the government to prove that defendant occupied a position as organizer or supervisory position with respect to continuing narcotics trafficking operation in concert with five or more persons. See *United States v. Sperling*, 507 F.2d 1323 (2d Cir.), *cert. denied*, 420 U.S. 949, on remand 413 F.Supp 845 (1974). Such proof of acting in concert with five or more persons was part of the government's burden of proof in establishing the elements of CCE offense in violation of 21 U.S.C. 848 in Appellant's case. Because it has been found that Johnson was not a member of the conspiracy ad was not

a distributor for Appellant, the evidence is insufficient, as a matter of law, to find that Appellant managed or supervised the requisite five or more persons necessary to convict under 21 U.S.C. 848.

The evidence did not permit a rational jury to find that Appellant occupied a position of manager or supervisor with respect to five or more persons. The trial court informed the jury that:

> "This case has been disposed of as to certain defendants, and when you receive a copy of the indictment, you will note that certain defendants are listed on the initial page of the indictment, but those counts have been withdrawn from those available to you, but you will notice that certain are missing from the trial at this time. They are specifically Richard Wilkes, Jane Doe, Duran Montgomery, Mark Edmead, Dennis E. Smith, Norman L. Johnson, Jr., and Sharon Taylor. *They are no longer of any concern to you,* and you should not speculate as to the reason for the disposition of their case. *This disposition should not control influence tour verdict with reference to the remaining defendants, and you must base your verdict as to each of the defendants solely on the evidence against each of them. Trial Court Judge's instruction to the jury at Tr pp 2022-2023)* (Emphasis Added)

The Court thus told the jury it could not consider any of the others not present at trial. In effect it told the jury that it could not decide whether those other would make up the five needed under 848. The jury was thus left only with Norma Thompson, Boysie Ash, Victoria Wills, John V. Christian, and Herbert Leon Johnson as the requisite five needed to convict Appellant of CCE in violation of 21 U.S.C. 848. But this Court reversed Johnson's conspiracy conviction thus decisicely removing Johnson from

the tabulation. Absent Johnson, the jury could not have reached a sustainable verdict of guilty on 848 against Appellant. Where there is *probability* that the error contributed to the verdict, reversal is required. See, *Wilson v Mintzes*, 761 F.2d 275, 288 (6th Cir. 1985). No harmless error rule when error contributes to verdict obtained. See *Miller v. Norvell* 775 F.2d 1572, 1576 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 19915 (1986). Some errors necessarily render trial fundamentally unfair. See *Rose v. Clark*, 478 U.S. 570 (1986).

Accordingly, this court should reverse the CCE conviction against Appellant on insufficiency grounds and direct that the sentence of fifty (50) years imprisonment be vacated.

## IV. APPELLANT'S CHALLENGE TO THE RICO CONVICTION (18 U.S.C. SECTION 1962 c)) CONSTITUTES A QUESTION OF JURISDICTION WHICH MAY BE RAISED AT ANY TIME TO PERMIT REVIEW UNDER 28 U.S.C. SECTION 2255

The District Court declined to review Appellant's RICO conviction on the premise that the issue challenging the validity of the RICO conviction under ineffective assistance of counsel was available to the [appellant] at the time of the direct apeal and may not be raised collaterally ("U.S. District court Memorandum and Order, p.7). The claim challenging the RICO conviction raises an important question because the claim effects the subject matter jurisdiction of the Court to try Appellant on the RICO count. In the instant case, the Government and Appellant's attorney entered into a pre-trial stipulation that the 1508 Club was a business engaged in interstate commerce. Appellant now argues (and the Government

does did not deny) that the law of the State of Maryland prohibited any Maryland business licensed for the retail sale of alcoholic beverages to sell outside of the State. The government offered no evidence beyond the stipulation to meet its burden of proof on this element of the RICO count. If the evidence as represented by the government did not establish that the 1508 Club was engaged in such a manner as to effect interstate commerce, the government did not prove that the matters charged in the RICO count constituted an offense under the federal jurisdiction of the United States District Court. Questions of jurisdiction can be raised at any time. (*United States v. Fallop,* 838 F.2d 105, 11 N.2 (4th Cir. 1988) (citing *McGrath v. Kristensen,* 340 U.S. 162, 167, 71 S.Ct. 224, 228, 95 L.Ed. 173 (1950)). The rule is inflexible and without exception.

On every writ of error or appeal, the first fundamental question concerns jurisdiction, appellate jurisdiction and trial jurisdiction of the courts involved. This is a question a court is bound to ask and answer for itself, even when not otherwise raised. See *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L.Ed.2d 674, 692 N.4, 106 S.Ct. 1431 (1986) (citing *Mansfield C. & L.M.R. Co. v. Swan,* 11 U.S. 379, 382, 28 L.Ed. 462, 4 S.Ct. 510 (1884).

The very nature of the challenge to the RICO conviction here requires reversal. The unauthorized stipulation of the interstate operation of the 1508 Club is in effect an attempt to confer subject matter jurisdiction on the court below. A stipulation is merely an evidentiary consent and it is well settled that parties cannot confer subject matter jurisdiction by consent. Because interstate commerce activity is an essential element of RICO, it constitutes a fact having legal significance established by the statutory provisions set forth by Congress. It is there-

fore a subject to which no stipulation can be made. See *Platt v. United States*, 163 F.2d 165 (10th Cir. 1947). Appellant should not be tried in a United States District Court on conduct which clearly does not offend the laws of the United States and no stipulation may is cognizable which attempts to convey subject matter jurisdiction upon a federal court.

## V. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL

In denying Appellant's claim that he was denied the effective assistance of counsel, the District Court below stated that:

> "A review of the entire record in this case reaffirms this Court's impression that defendant Webster received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness. Webster's motion to vacate based on ineffective assistance of counsel will, accordingly, be denied." *U.S. District Court Memorandum and Order, p. 7.*

The Supreme Court's decision in *Kimmelman v. Morrison, supra* requires this Court to reverse the District Court.

The District Court characterized Appellant's counsel's representation as meeting "the recognized standards of quality and effectiveness". But the very facts as set forth by his 2255 claims requires this Court to reverse the lower court's decision and find that Appellant's trial counsel and appellate counsel provided performances below the accepted standard. *De novo* Review of Appellant's 2255 claims will persuade this Court that, but for

attorney error, the outcome of Appellant's trial would probably have resulted in a judgment of acquittal as to the CCE Count (Count 34).

Appellant argued in the District Court below, and the government conceded, that the trial court's instruction did incorrectly identify Sharon Gilliam as an accomplice and that such instruction was error. Notwithstanding the fact that the law holds that "[a] verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, is error", *see Sandstorm v. Montana,* 442 U.S. 510 (1979), Appellant had a right to have his trial counsel object to the use of the court's erroneous instruction which clearly identified Sharon Gilliam as Appellant's accomplice. Failure to object caused Appellant to be subject to a guilty decision with Sharon Gilliam considered as one of the five or more persons under Appellant's supervision or management. Sharon Gilliam was neither a member of the conspiracy nor a co-defendant at Appellant's trial. Failure to object to the instruction prejudiced Appellant by denying him a fair jury trial.

Further, because it is well settled law that the jury must be unanimous in its decision as to determinations of guilt or innocence in criminal trials, Appellant was entitled, as a matter of law, to have the judge at trial to charge the jury with a specific unanimity instruction as to the identity of the five persons who were found to be under his management or supervision for CCE purposes. Because Sharon Gilliam and Herbert Leon Johnson were obviously improperly countered by the jury as one of the five, the unanimity instruction is clearly appropriate for constitutional reasons. If either Gilliam or Johnson were counted by some of the jurors as being among the five persons under Appellant's supervision or manage-

ment for CCE purposes, the CCE conviction against him would have to be reversed as a matter of law. ". . .Often times, the government will be able to establish that an individual's place in the hierarchy or structure of the organization establishes his direction of five or more people. . . However, when the government, as here, does not rely on such an approach and instead chooses to rely on the activity of specific individuals, it must submit sufficient evidence to permit a rational jury to conclude that each of those individuals had been directed by the defendant." See *United States v. Alvarez*, 860 F.2d 801, 817-18 (7th Cir. 1988). The Supreme Court of the United States held that:

> "With respect to findings of guilt on criminal charges, the court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g. *Yates v. United* States, 354 U.S. 298, 312 (1957); *Stromberg v. California*, 283 U.S. 359, 367-368 (1931)."
> See *Mills v. Maryland*, _____ U.S. _____, (No. 87-5367) (Slip Opinion) (Decided June 6, 1988).

If the specific unanimity instruction had been given to the jury and had Sharon Gilliam or Herbert Leon Johnson been included as part of the five persons, Appellant's CCE conviction clearly would have to be reversed as a matter of law. Therefore, failure to request the specific unanimity instruction at trial constitutes either ineffective assistance of counsel under the standards enunciated in *Strickland v. Washington, supra* or plain error.

## CONCLUSION

WHEREFORE, on the basis of the foregoing, the District Court should be reversed where it has denied the Motion to Vacate and Set Aside Appellant's CCE and RICO convictions under 28 U.S.C. 2255. This case should be remanded to the District Court for consideration of Appellant's issues on the merits and for appropriate determination, or, in the alternative, this Court should afford Appellant's 2255 claims *de novo* review on the merits and reverse the convictions on the CCE and RICO Count of the Indictment and further vacate and set aside the sentences imposed therefor.

Respectfully submitted,

/s/ R. K. Mundy

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to Geoffrey Robert Garinther, Assistant United States Attorney, 101 W. Lombard Street, Baltimore, Maryland on this 1st day of May, 1990.

/s/ R. K. Mundy
R. KENNETH MUNDY

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 90-6784

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WALTER R. WEBSTER, a/k/a Gangster,
a/k/a Mr. G, a/k/a G,

Defendant - Appellant.

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CR-79-60-Y, CA-88-3780-Y)

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Argued: October 6, 1990 Decided: November 8, 1990

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Before WIDENER and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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ARGUED: R. Kenneth Mundy, Washington, D.C. for Appellant. Richard Charles Kay, Assistant United States Attorney, Baltimore, Maryland, for Appellee. ON BRIEF: Breckinridge L. Willcox, United States Attorney, Geoffrey R. Garinther, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant brought this action under 28 U.S.C. §§ 1651, 2202 and 2255 seeking to set aside and vacate certain criminal sentences imposed following his May 1979 convictions of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, conducting the affairs of the enterprise through a pattern of racketeering in violation of 18 U.S.C. §§ 1961, 1962(c), and 1963, conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. § 846, 17 counts of illegal use of the telephone in violation of 21 U.S.C. § 843(b) and (c), and three counts of interstate travel in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952 (a) (3). As a part of the conviction and sentencing order, the district court provided that it would set aside the 17 counts of illegal use of the telephone as having merged into the greater sentence imposed under Count 2, the conspiracy count. On appeal (*United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982)), all convictions were affirmed except the conspiracy conviction under Count 2. It appears that the conviction on Count 2 has never been

stricken as directed by our opinion in 1981, and in the present proceeding the district court directed the record to be corrected and this conviction stricken. However, the district court denied Webster's further request that the 17 convictions of illegal use of the telephone be set aside. There is no merit to appellant's claim of error as to these 17 convictions. The district court at sentencing clearly provided that the telephone convictions would be vacated if the conspiracy count was affirmed. However, since the conspiracy count was not affirmed, appellant is not entitled to be relieved of the convictions.

Appellant also attempted to raise challenges to the sufficiency of the evidence and erroneous jury instructions to his CCE and RICO convictions and claims that his failure to raise these exceptions on direct appeal was the result of ineffective assistance of counsel. However, he has failed to make a showing of cause and actual prejudice as required by *United States v. Frady*, 456 U.S. 152 (1982). Ineffective assistance of counsel may not be used to establish cause under the *Frady* test.

The district court considered the ineffective assistance of counsel claim and found that appellant had not met the burden imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), and we find no error in this ruling.

*AFFIRMED*